8967

SUPREME COURT OF THE UNITED STATES.

No. 115.

RACHEL LUTHER, COMP'T,

vs.

LUTHER M. BORDEN ET AL.

ON A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT U. S. FOR THE DISTRICT OF RHODE ISLAND.

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J. & G. S. Gideon, printers.

At a circuit court of the United States for the first circuit, holden at Newport, within and for the Rhode Island district, on the sixteenth day of June, in the year of our Lord one thousand eight hundred and forty-five, and of the independence of the United States the sixty-ninth—

Present, the honorable Joseph Story, associate justice of the Supreme Court of the United States, Hon. John Pitman, United States district judge for the Rhode Island district, Walter S. Burgess, United States district attorney for said district, Burrington Anthony, United States marshal, John T. Pitman, clerk—

In the record of the proceedings of the said court, among others, are the following, to wit:

Parties.

RACHEL LUTHER, complainant,
vs.
LUTHER M. BORDEN, Stephen Johnston, William L. Brown, John H. Munroe, William B. Snell, James Gardner, John Kelly, Silas P. Martin, and Hammond Seargeant, defendants.

Be it remembered, that heretofore, to wit, at the November term, A. D. 1842, the following writ and declaration were filed:

Writ.

RHODE ISLAND DISTRICT, *sc:*

The President of the United States of America to the marshal of said district, or to his deputy, greeting:

We command you to summon Luther M. Borden, master mariner, Stephen Johnston, cooper, William L. Brown, housewright, John H. Munroe, tailor, William B. Snell, custom house officer, James Gardner, merchant, John Kelly, master mariner, Silas P. Martin, master mariner, Hammond Seargeant, mariner, all of Warren, in the State and district of Rhode Island, and citizens of said State and district, if they may be found in your district, to answer the complaint of Rachael Luther, of Fall River, in the State and district of Massachusetts, and a citizen of said State and district, at the next circuit court, to be holden at Providence, within and for the Rhode Island district, on the fifteenth day of November next ensuing the date hereof, in an action of trespass—for that the said defendants, at Warren aforesaid, on the 29th day of June, 1842, A. D. in the night time, with force and arms, broke and entered the plaintiff's lodging room, in said Warren; and then and there, said defendants being then and there armed with guns, pistols, swords, and other dangerous and deadly weapons, in and upon the plaintiff made an assault, and her then and there did beat, bruise, wound, restrain, imprison, and evil entreat, and other enormities they, said defendants, then and there did to the plaintiff, against our peace,

as by the declaration to be filed in court will be fully set forth, to the damage of the plaintiff five thousand dollars. Hereof fail not; and make true return of this writ, with your doings thereon.

Witness the Hon. Roger B. Taney, our chief justice, at Providence, this 24th day of October, anno domini 1842.

JOHN T. PITMAN, *Clerk*
CHARLES F. TOWNSEND,
Plaintiff's surety.

Marshal's return.

RHODE ISLAND DISTRICT, *sc:*

WARREN, *October 25th*, 1842.

Summoned the within named Luther M. Borden, Stephen Johnson, William L. Brown, John H. Munroe, and James Gardner, by delivering to each of them a true and attested copy of this writ. Also summoned the within named William B. Snell, John Kelly, Silas P. Martin, and Hammond Seargeant, by leaving a true and attested copy of this writ at each of their last and usual places of abode, as commanded.

SYLVESTER HARTSHORN,
U. S. marshal R. I. district.

Fees, 9 services - - - -	$18 00
9 copies - - - -	4 50
11 miles travel - - - -	1 10
	$23 60

Received my fees for service of Benj. M. Bosworth, esq.
S. HARTSHORN,
U. S. marshal.

Declaration.

United States circuit court, November term, A. D. 1842.

RHODE ISLAND DISTRICT, *sc:*

Rachel Luther, of Fall River, in the State and district of Massachusetts, and a citizen of said State and district, complains of Luther M. Borden, master mariner, Stephen Johnson, cooper, William L. Brown, housewright, John H. Munroe, tailor, William B. Snell, custom house officer, James Gardner, merchant, John Kelly, master mariner, Silas P. Martin, master mariner, Hammond Seargeant, mariner, all of Warren, in the State and district of Rhode Island, and all citizens of said State and district, summoned by the marshal in an action of trespass:

For that the said defendants, at Warren aforesaid, on the 29th day of June, A. D. 1840, in the night time, with force and arms, entered the plaintiff's bed chamber, in the dwelling house of Martin Luther, situated in Warren aforesaid, in which the said plaintiff and her servant woman were then and there in bed, and sleeping, assaulted the said

plaintiff, and beat and bruised her; and then and there, with threats and menaces, forced the said plaintiff and her said servant woman, in their night clothes, from their bed; and then and there, with guns and bayonets, they, said defendants, threatened the life of the said plaintiff; and did then and there, with guns in their hands, point and thrust the bayonets thereon their said guns fixed, at the breast of the plaintiff, and then and there threatened to run them through her body; and then and there, with opprobrious and insulting language, and with threats and menaces, detained the said plaintiff and her said servant woman in their night clothes, as aforesaid, in their, the defendants', custody, and with violence imprisoning in, and restraining the said plaintiff from leaving her said room for a long space of time, to wit, the space of half an hour; and other injuries, outrages, and enormities then and there did, against the peace, and to the damage of the plaintiff five thousand dollars.

Also, for that the said defendants, at said Warren, on the 29th day of June, A. D. 1842, in the night time, with force and arms, broke and entered the plaintiff's lodging chamber, in the house of Martin Luther, situated in said Warren, in which said chamber the plaintiff and her maid servant were then and there in bed, and sleeping; and then and there made another assault upon the plaintiff; and then and there threatened the life of the plaintiff, and with guns, with bayonets thereon fixed, they, said defendants, menaced said plaintiff, and the same pointed and thrust at her breast and body, threatening and attempting to stab and kill her therewith; and then and there, with threats and opprobrious and insulting language, and with menaces, drove the plaintiff and her said servant woman, in their night clothes, from their beds; and then and there, with their bayonets pointed to the breast and body of the said plaintiff, and to the breast and body of her said servant woman, and with threats of personal violence, they, said defendants, illegally restrained the plaintiff of her liberty, and her, and her said servant woman, in their night clothes as aforesaid, unjustly detained for a long space of time, to wit, for the space of one hour, and greatly terrified said plaintiff and her said servant woman, and obliged her to remove from her home at said Warren, whereby the said plaintiff hath lost the comforts of her home at said Warren, the society of children and family, the labor of her said servant woman, and the peace of her own mind ever since; and other enormities the said defendants then and there to the plaintiff did, against our peace, and to the damage of the plaintiff five thousand dollars.

And also, for that the said defendants, at said Warren, on the 29th day of June, A. D. 1842, with force and arms, in and upon the plaintiff made an assault, and her did then and there beat, bruise, wound, and evil entreat, and other enormities to the plaintiff the said defendants then and there did, against our peace, and to the damage of the plaintiff five thousand dollars.

Also, for that the said defendants, at Warren, on the 29th day of June, A. D. 1842, with force and arms, entered the plaintiff's cham-

ber, situated in the house of Martin Luther, in said Warren, where the said plaintiff was then in bed, and sleeping, and then and there, with deadly weapons, another assault in and upon the plaintiff did then and there make; and then and there did threaten and menace her life, and with like threats and menaces they, the said defendants, obliged the said plaintiff to arise from her said bed; and then and there, with like threats and menaces, the said defendants forcibly kept and detained the plaintiff exposed in her night dress for a long space of time, to wit, for the space of one hour; and other outrages, injuries, and enormities on the plaintiff they, said defendants, then and there committed, against our peace, and to the damage of the plaintiff five thousand dollars, as laid in her writ, dated the 24th day of October, A. D. 1842. Wherefore she sues by her attorneys,

ATWELL & MANCHESTER.

And afterwards the following pleas were made:

Defendants' pleas.

Circuit court of the United States, November term, A. D. 1842.

RHODE ISLAND DISTRICT, *sc:*

Case.

RACHEL LUTHER
vs.
LUTHER M. BORDEN and others.

First plea.

And the defends. come and defend the force and injury, when, &c., and as to the breaking and entering the plffs. bed chamber, in her declarations alleged, they say: That the plaintiff, her action aforesaid against them ought not to have or maintain, because they say, that on the 24th day of June, A. D. 1842, and for a long time before, and from that time continually, until after the said trespasses are alleged to have been committed, large numbers of men were assembled in arms in different parts of said State of Rhode Island and Providence Plantations, for the purpose and with the intent of making war upon said State, and overthrowing the government of said State, and destroying the same by military force; and with such illegal, malicious, and traitorous intent and purpose, at and during the times aforesaid, did, in different parts of said State, make and levy war upon said State, and upon the government and citizens thereof, attempting and enterprising the hurt, detriment, annoyance, and destruction of the inhabitants of said State, and the overthrow of the government thereof. And the defendants aver, that, in order to protect and preserve the said State, and the government and citizens thereof, the said State of Rhode Island, on the 25th day of June, 1842, was, by legal and competent authority, declared to be under martial law, and the commanders and military officers of said State were authorized to use and exercise the law martial. And the defendants further aver, that at said time, when said

State was declared to be under martial law as aforesaid, the occasion necessarily required the use and exercise of the law martial in said State. And the defendants further aver, that at the time when the pretended trespasses mentioned and set forth in the plaintiff's declaration are alleged to have been committed, the said State of Rhode Island was under martial law as aforesaid, and the commanders and military officers of said State were authorized to use and exercise the law martial; and that at said time the defts. were enrolled in the company of infantry, in the town of Warren, in the fourth regiment of the militia of said State, and were under the command of John T. Childs, of said Warren, a military officer, duly appointed and legally qualified to act as their commander. And at said time the defts., at said Warren, were ordered by said John T. Childs, their said commander, to arrest and take one Martin Luther, who, the defts. aver, was at said time aiding and assisting in the aforesaid traitorous, malicious, and unlawful purposes and intent, to overthrow the government of said State by military force, and in making and levying war upon said State, and upon the government and citizens thereof; and the defts. were then and there ordered by their said commander, if necessary for the purpose of arresting and taking said Martin Luther, to break and enter the dwelling house of said Martin Luther for said purpose. And the defts., verily believing that the said Martin Luther was concealed in said dwelling house, and in said bed chamber of the plff., and that it was necessary, for the purpose of taking and arresting said Martin Luther, to enter said dwelling house, and the said bed chamber of the plff., did then and there, in obedience to the command of the said John T. Childs, their said commander, enter the said dwelling house of the said Martin Luther, and the said bed chamber of the plff., for the purpose of arresting and taking the said Martin Luther. And because it was necessary, in order to take and arrest the said Martin Luther, in obedience to the commands of the said John T. Childs, their said commander, to enter the said dwelling house, and to search and examine the different rooms and apartments in said dwelling house, and to break and enter and search the said bed chamber, the defts. did then and there break and enter the said dwelling house, and the said bed chamber of the plff., and search and examine the different rooms and apartments of said dwelling house, for the purpose of arresting the said Martin Luther, doing as little damage to said dwelling house as possible, as it was lawful for them to do; all which the defts. are ready to verify. Wherefore the defts. pray judgment, if the plff. her action aforesaid against them ought to have or maintain, and for their costs.

Second plea.

Saving which, if overruled, by leave of court first had and obtained, and for further plea, said defendants come and defend the force and injury, when, &c.; and, as to the breaking and entering the plffs. bed chamber, in her declaration set forth, they say that the plff. her action thereof as aforesaid ought not to have or maintain, because, they say,

that at the time when the pretended trespasses set forth in the plffs. declaration are alleged to have been committed, large numbers of men were assembled in arms, and warlike array, in different parts of the State of Rhode Island and Providence Plantations, who made war upon said State, attempting and enterprising the destruction, detriment, hurt, and annoyance, of the inhabitants of said State, and the overthrow and destruction of the government of said State, (and the said State of Rhode Island and Providence Plantations, by legal authority, was declared to be under martial law,) and the commanders and military officers of said State were authorized to use and exercise the law martial. And the defendants, being soldiers, enrolled in the company of infantry in the town of Warren, in the fourth regiment of militia of said State, and at the time when said trespasses are alleged to have been committed, being under the command of John T. Child, of said Warren, a military officer, duly appointed and qualified to act as their commander, were ordered at Warren, in said State, by the said John T. Childs, their said commander, to arrest and take one Martin Luther, and other persons, who were supposed to be concealed in the dwelling house wherein the plff. resided, and plotting and enterprising the hurt, detriment, and destruction of the inhabitants of said State, and the overthrow of the government of said State, and bring him or them before said John T. Child. And the defts., in obedience to the commands of the said John T. Child, their superior officer, then and there entered the dwelling house for the purpose of arresting and taking said persons; and, in obedience to the commands of said John T. Child, their superior officer, the defendants then and there arrested one Stafford Healy, and one Soramus A. Brayton, whom the defendants then and there found concealed in said house, and by order of said John T. Child committed them to jail in the county of Bristol. And because, at the said time when said trespasses are alleged to have been committed, it was necessary and expedient for the defendants, in order to arrest and take the said Martin Luther, and said other persons, according to the commands of the said John T. Child, their superior officer, to break and enter the said dwelling house, and the said bed chamber of the plff., and search and examine the said dwelling house, and the different rooms and apartments in said dwelling house, the defendants, by the command of the said John T. Child, their superior officer, did break and enter said dwelling house, and the said bed chamber of the plff., and did search and examine the different rooms and apartments in said dwelling house, for the purpose of arresting the said Martin Luther, and other persons so attempting and enterprising the hurt, detriment, and annoyance of the inhabitants of said State, and the overthrow of the government of said State, doing as little damage to the said premises as they possibly could. All which it was lawful for them to do. All which the defendants are ready to verify. Wherefore they pray judgment, if the plaintiff her action aforesaid ought to have or maintain, and for their cost.

Third plea.

Saving which, if overruled, by leave of court first had and obtained, and for further plea, said defendants come and defend the force and injury, when, &c. And, as to the breaking and entering the plffs. bed chamber, in her declaration set forth, they say that the plff. her action thereof as aforesaid ought not to have or maintain, because, they say, that at the time when the pretended trespass set forth in the plff. declaration are alleged to have been committed, large numbers of men were assembled in arms and warlike array in different parts of the State of Rhode Island and Providence Plantations, who made war upon said State, attempting and enterprising the destruction, detriment, hurt, and annoyance of the inhabitants of said State, and the overthrow and destruction of the government of said State. And the defendants aver, that the legislature of said State of Rhode Island, duly and legally chosen, elected and constituted, according to the provisions of the charter, or fundamental law, and the ancient and long established usages of said State, enacted the following law, in pursuance of the authority contained in said charter, of the ancient usages of the State, and of the general legislative power conferred upon them by said charter and usages, to wit:

"*An act establishing martial law in this State.*

"Be it enacted by the General Assembly, as follows:

"Section 1. The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force until otherwise ordered by the general assembly, or suspended by proclamation of his excellency the Governor of the State."

And the commanders and military officers of said State were authorized to use and exercise the law martial. And the defendants, being soldiers, enrolled in the company of infantry in the town of Warren, in the fourth regiment of militia of said State, and, at the time when said trespasses are alleged to have been committed, being under the command of John T. Child, of said Warren, a military officer, duly appointed and qualified to act as their commander, were ordered at Warren, in said State, by the said John T. Child, their said commander, to arrest and take one Martin Luther, and other persons, who were supposed to be concealed in the dwelling house wherein said plaintiff resided, and plotting and enterprising the hurt, detriment, and destruction of the inhabitants of said State, and the overthrow of the government of said State, and bring him or them before said John T. Child; and the defendants, in obedience to the commands of the said John T. Child, their superior officer, then and there entered the said dwelling house for the purpose of arresting and taking said persons; and, in obedience to the commands of said John T. Child, their superior officer, the defendants then and there arrested one Stafford Healy and one Soramus A. Brayton, whom the defendants then and there found concealed in said house, and, by order of said John T. Child, committed them to the jail

in the county of Bristol. And because, at the said time when said trespasses are alleged to have been committed, it was necessary and expedient for the defendants, in order to arrest and take the said Martin Luther, and said other persons, according to the commands of the said John T. Child, their superior officer, to break and enter the said dwelling house, and the said bed chamber of the plaintiff, and search and examine the said dwelling house, and the different rooms and apartments of said dwelling house; the defendants, by the command of the said John T. Child, their superior officer, did break and enter said dwelling house, and the said bed chamber of the plaintiff, and did search and examine the different rooms and apartments in said dwelling house, for the purpose of arresting the said Martin Luther, and other persons so attempting and enterprising the hurt, detriment, and annoyance of the inhabitants of said State, and the overthrow of the government of said State, doing as little damage to the said premises as they possibly could. All which it was lawful for them to do. All which the defendants are ready to verify. Wherefore they pray judgment, if the plaintiff her action aforesaid against them ought to have or maintain, and for their costs.

Fourth plea.

And as to the residue of the trespasses alleged and set forth in the declaration of the plaintiff, except the breaking and entering the said bed chamber of the plaintiff for the purpose of arresting the said Martin Luther and other persons, doing as little damage as possible, the defendants, by leave of court, come and defend the force and injury, when, &c., and say, that they are not guilty in manner and form as the plaintiff in her declaration thereof against them has declared; and of this they put themselves upon the country for trial.

By their attorneys,

GREENE & BOSWORTH, and
WHIPPLE.

Plaintiff's replication.

UNITED STATES CIRCUIT COURT,
Rhode Island district, sc:

And the said Rachel Luther, as to the said several pleas of the said defendants above by them pleaded as to the said assaulting, evilly treating, trespasses, and other wrongs and injuries to the said Rachael, in the said declaration mentioned and above committed by the said defendants, saith, that the said Rachael Luther, by reason of anything by the said defendants in their said several pleas alleged ought not to be barred from having and maintaining her action aforesaid thereof against them, the said defendants; because she saith, that the said defendants, at said Warren, on the day of June, A. D. 1842, of their own wrong, and without the causes by them, said defendants, in their said several pleas above alleged, assaulted, beat, evilly treated the said Rachael, and other trespasses and wrongs and injuries to her,

said Rachael, then and there did, in manner and form as the said Rachael Luther has complained; and this she prays may be enquired of by the country.

By her attorneys,

ATWELL & MANCHESTER.

And the case having been continued from term to term, till the present, and being now called for trial, the following agreement was filed:

CIRCUIT COURT OF THE UNITED STATES,
June term, A. D. 1845.

It is agreed by the parties in this case, that the same shall be taken up to the Supreme Court of the United States by the plaintiff, and that the court divide pro forma upon the questions of law upon all the points made by the plaintiff or defendants, and that the same shall be prepared and made before the court at chambers within sixty days from the rising of this court at this term.

HORACE A. MANCHESTER,
Attorney for Plaintiff.
ALFRED BOSWORTH,
Attorney for Defendants.

Whereupon, the following offerings were made:

Plaintiff's offerings.

And upon the trial of the issue the counsel for the plaintiff, to maintain and prove the issue on her part, offered to give in evidence the following matters, facts, and things, in manner following, to wit:

First. The plaintiff offered to prove that at the time of the commission of the alleged trespasses and acts as admitted by the defendants in their plea of justification under martial law, the People's constitution, so called, was in force in Rhode Island as the supreme law. That the general assembly, which passed the act of June 25, 1843, declaring martial law, was not the rightful legislative authority of said State, but had been superseded by said People's constitution, and the legislative body and executive officers chosen under the same. And to prove this, the plaintiff offered the several facts, matters, and things set forth from *First* to *Twenty-six*, inclusive, on the part of the plaintiff, Martin Luther, in the bill of exceptions filed by him, and allowed by this honorable court, and now pending in the Supreme Court of the United States, at Washington, in the action of Martin Luther vs. Luther M. Borden and others; which several twenty-six offerings of the said plaintiff, with the papers, documents, and matters therein named, and thereto appended, are to be taken and used as parts of this case.

Said offerings being made as follows, viz:

First. The plaintiff offered in evidence the proceedings and resolutions of a convention of the State of Rhode Island and Providence Plantations, passed 29th May, 1790, (copy annexed to said case of Martin Luther vs. Luther M. Borden et als., being marked A.)

Second. The plaintiff offered in evidence the report of a committee of the house of representatives of the State of Rhode Island, &c., made in June, 1829, upon certain memorials to them, therein praying for an extension of the right of suffrage in said State. (Copy annexed to said case, being marked B.)

Third. The plaintiff offered in evidence resolutions passed by the general assembly of said State, at their January session, 1841. (Copy annexed to said case, being marked C.)

Fourth. The plaintiff then offered in evidence the memorial addressed to said assembly at said session, by Elisha Dillingham and others. (Copy annexed to said case, being marked D.)

Fifth. The plaintiff offers evidence to prove that in the last part of the year 1840, and in the year 1841, associations were formed in many, if not in all the towns in said State, called suffrage associations, the object of which was to diffuse information among the people upon the question of forming a written republican constitution, and of extending the right of suffrage. To prove this, she offers the officers and members of said associations; also, the declaration of principles of said association, passed February 7, 1841, and the proceedings of a meeting thereof, on the 13th day of April, 1841. Also, the plaintiff offered witnesses in evidence to prove that a portion of the people of this State assembled at Providence, on the 17th day of April, 1841, under a call of the Rhode Island suffrage association, to take into consideration certain matters connected with the existing state of suffrage in said State, and to prove the proceedings of a meeting thereof on the 13th day of April, 1841.

Also, the plaintiff offered witnesses to prove that a portion of the people of this State assembled at Providence, on the 17th day of April, 1841, under a call of the Rhode Island suffrage association, to take into consideration certain matters connected with the existing state of suffrage in said State, and to prove the proceedings of said meeting by the chairman and clerks of said meeting, and other persons present thereat. (Copies of which proceedings, &c., are annexed to said case, marked E.)

Sixth. The plaintiff offered to prove that on the 5th day of May, A. D. 1841, a mass convention of the male inhabitants of this State, consisting of four thousand and upwards, of the age of twenty-one years and upwards, met in Newport, in said State, in pursuance of a notice for that purpose. Whereat, among other things, it was resolved by said convention, as follows, viz: (See resolutions, &c., annexed to said case, marked F.)

Seventh. The plaintiff offered to prove that the said mass convention, at Newport aforesaid, adjourned their meeting from said 5th day of May, 1841, to the 5th day of July, 1841, to Providence, in said State, at which place and time last mentioned said convention reassembled, consisting of six thousand persons and upwards, of the age of twenty-one years and upwards, the same being free white male inhabitants of the State; when and where, among other things, it was resolved

by said convention, as follows: (Copies of resolutions are annexed to said case, marked G.)

Eighth. The plaintiff offered in evidence certain resolutions of the general assembly of said State, passed at their May session, 1841; also a certain bill or act presented by a member of said assembly at the same session, and the proceedings of said assembly thereupon, (copies of which are annexed to said case, marked H^a, H^b.)

Ninth. The plaintiff offered in evidence the minority report from the committee on the judiciary upon the bill or act mentioned in the eighth offering, made to said general assembly at their June session, A. D. 1841, and the action of said general assembly thereupon, (copies of which are annexed to said case, and are marked I^a, I^b.)

Tenth. The plaintiff offered to prove that said State committee, by virtue of authority in them vested by the said mass convention, notified the inhabitants of the several towns, and of the city of Providence in this State, to assemble together and appoint delegates to a convention for the purpose of framing a constitution for said State; and that every American male citizen, twenty-one years of age and upwards, who had resided in this State as his home one year preceding the election of delegates, should have the right to vote for delegates to said convention to draught a constitution, to be laid before the people of said State; and that every thousand inhabitants in the towns in said State should be entitled to one delegate, and each ward in the city of Providence to three delegates, as appears by the request duly published and proclaimed, and also an address from said committee to the people of the State. (Copies whereof are annexed to said case, marked J^a, J^b.)

Eleventh. The plaintiff offered to prove that the said notice, request, or call, was duly published and promulgated in public newspapers, and printed and published in said State, and by handbills which were stuck up in the public houses, and at various other places of public resort, in all the towns, and in every ward in the city of Providence, in said State.

Twelfth. Plaintiff offered to prove that, at the adjourned mass convention aforementioned, as held at Providence in said State on the 5th day of July, 1841, the people of this State, then present, did, by vote duly taken, enlarge said State committee by the addition of the following named persons, all citizens of this State, viz:

Providence county—Henry L. Webster, Philip B. Stiness, Metcalf Marsh.

Newport county—Silas Sisson.

Bristol county—Abijah Luce.

Kent county—John B. Sheldon.

Washington county—Wager Weden, Charles Allen.

Thirteenth. The plaintiff offered to prove that, at the meeting of said State committee on the 20th day of July, 1841, at Providence aforesaid, when the said notice, request, or call was ordered, the following members of said committee were present, and approved of the aforesaid call, and of all the proceedings then had, to wit, Welcome B. Sales, Samuel H. Wales, Henry L. Webster, Benjamin Arnold, jr., Metcalf

Marsh, Philip B. Stiness, Dutee J. Pearce, Silas Sisson, Benjamin M. Bosworth, Abijah Luce, Sylvester Himes.

Fourteenth. The plaintiff then offered to prove that in the month of August, 1841, citizens of said State, qualified as aforesaid, did meet in their several towns, and in the several wards in the city of Providence, and made choice of delegates in conformity with said notice, to meet in convention to form and draught a constitution to be laid before the people of this State; and she offered the chairman presiding at said meeting, and the clerks thereof, the votes and ballots then and there cast by the persons voting thereon, and of the persons then and there voting, to prove the aforesaid facts, and the number of citizens so voting.

Fifteenth. The plaintiff offered to prove that said delegates did meet in convention in said city of Providence in the month of October, 1841, and draughted a constitution, and submitted it to the people of said State for their examination, and then adjourned to meet in said city of Providence in the month of November, 1841; and she offered to prove this by the production of the original minutes or records of the proceedings of said convention, verified by the oaths of the president and secretaries thereof, and of divers persons attending the same as members thereof, or delegates thereto.

Sixteenth. The plaintiff offers to prove that, in pursuance of said adjournment, the said delegates did again meet in convention in said Providence, in said month of November, and then completed the draught of a constitution (a copy of which is annexed to said case, marked K,) and submitted the same to the people of said State for their adoption or rejection, recommending them to express their will on the subject at meetings to be duly presided over by moderators and clerks, and by writing their names upon their tickets, and to be holden in their several towns and in the several wards of the city of Providence, on Monday, the 27th day of December, and on the two next succeeding days; and that any person entitled to vote, who from sickness or other cause might be unable to attend and vote in the town or ward meetings on the days aforesaid, might write his name on a ticket and obtain the signature, on the back of the same as a witness thereto, of a person who had given in his vote. Which tickets were in the following form, to wit: "I am an American citizen of the age of twenty-one years, and have my permanent residence or home in this State; I am (or not) qualified to vote under the existing laws of this State; I vote for (or against) the constitution formed by the convention of the people assembled in Providence, and which was proposed to the people by said convention on the 18th day of November, A. D. 1841." Which votes the moderator or clerk of any town or ward meeting should receive on either of the three days succeeding the three days before named; and which she offered to prove by the production of the said original minutes and records as aforesaid, verified as aforesaid, and by the testimony of the persons aforesaid, and by the 14th article of said constitution.

Seventeenth. The plaintiff offered to prove that meetings were held in the several towns and wards of the city of Providence aforesaid, and

on the days aforesaid, for the purposes aforesaid, and in pursuance of the requirements of said constitution; and the said moderators and clerks did receive on said 27th day of December, and the succeeding days aforesaid, such votes of persons qualified as aforesaid, and them carefully kept, and made registers of all the persons voting, which, together with the tickets given in by the voters, were sealed up and returned by said moderators and clerks, with certificates signed and sealed by them, to the secretaries of said convention, to be counted and declared at their adjourned meeting on the 12th day of January, A. D. 1842; all of which she offers to prove by the testimony of the several moderators presiding at said meeting, and of the clerks of the same, and of the secretaries of said convention, and by the production of the original votes or ballots cast or polled by the persons then and there voting, the original registers of all said persons so voting, and the said certificates signed and sealed as aforesaid, verified by the oaths of said moderators and clerks.

Eighteenth. The plaintiff offered to prove that the said convention
2. of delegates did meet in said Providence on the said 12th day of January, 1842, and did then and there count said votes; and the said convention did thereafterwards, on the 13th day of said January, pass the preamble and the resolutions following, to wit:

"Whereas, by the return of the votes upon the constitution, proposed to the citizens of this State by the convention on the 18th day of November last, it satisfactorily appears that the citizens of this State, in their original sovereign capacity, have ratified and adopted said constitution by a large majority; and the will of the people thus decisively made known ought to be implicitly obeyed and faithfully executed. We do therefore resolve and declare, that said constitution rightfully ought to be, and is the paramount law and constitution of the State of Rhode Island and Providence Plantations; and we further resolve and declare, for ourselves and in behalf of the people whom we represent, that we will establish said constitution, and sustain and defend the same by all necessary means."

Resolved, that the officers of this convention make proclamation of the return of the votes upon the constitution, and that the same has been
4. adopted and become the constitution of this State; and that they cause said proclamation to be published in the newspapers of the same.

Resolved, that a certified copy of the report of the committee appointed to count the votes upon the constitution, and of these resolutions, and of the constitution, be sent to his excellency, the Governor, with a request that he would communicate the same to the two houses of the general assembly. (A copy of which resolutions and proceedings are annexed to said case, marked L[c].)

And she further offers to prove that the same were sent to said Governor, and by him communicated to said general assembly, and by them
5. laid on the table; and that by a subsequent resolution of the house of representatives, in said general assembly, the further consideration thereof was indefinitely postponed; all these matters she offered to prove by the production of the original minutes or records of the convention

aforesaid, verified by the oaths of the president, vice-president, and secretaries thereof, by the report of the committee appointed by said convention to count said votes, verified by the certificates of the secretaries of said convention, and by the oaths of the members of said committee, and by the certificate of Henry Bowen, secretary of State under the then acting government, and of Thomas A. Jenckes, one of the clerks of the then house of representatives. And she further offered to prove that, at the same session of said assembly, a member of the house of representatives submitted to that body for their action a resolution, referring all the matters connected with the formation and adoption of the aforesaid constitution to a select committee, with instructions to them to ascertain and report the number of votes cast and the number of persons voting for the same, with full power to send for persons and papers; which resolution was rejected by said house of representatives, as appears by copies of the records of the said house for said session, (annexed to said case, marked L^a,) and an exhibit, (annexed to said case, marked L^b,) and the testimony of witnesses.

Nineteenth. The plaintiff then offered to prove that the officers of said convention did make the proclamation required by the said resolution of the said convention; she offered to prove this by a copy of said proclamation certified by said officers, the oaths of said officers, and by the testimony of other persons.

Twentieth. The plaintiff then offered to prove that said constitution was adopted by a large majority of the male people of this State, of the age of twenty-one years and upwards, who were qualified to vote under said constitution; and also adopted by a majority of the persons entitled to vote for general officers under the then existing laws of said State, and according to the provisions thereof; and that so much of the same as relates to the election of the officers named in the 6th section of the 14th article of said constitution, on the Monday before the third Wednesday in April, A. D. 1842, (to wit, on the 18th day of April,) and all other parts thereof, on the first Tuesday of May, 1842, (to wit, on the 3d day of said May,) and then and there became and was the rightful and legal constitution of said State, and paramount law of said State; and this she offered to prove, by the production of the original votes or ballots cast or polled by the persons voting for or against the adoption of said constitution, by the production of the original registers of the persons so voting, verified by the oaths of the several moderators and clerks of the meetings held for such voting, and *the* by the said constitution.

Twenty-first. The plaintiff produced a copy of said constitution verified by the certificates of Joseph Joslin, president of said convention of delegates elected and assembled as aforesaid, and for the purposes aforesaid, and of Samuel H. Wales one of the vice presidents, and of John S. Harris and William H. Smith, secretaries of the same; and offers the said Joslin, Wales, Harris, and Smith, as witnesses to prove the truth of the matters set forth in said certificates; which said copy, upon the proof aforesaid, she claims to be a true and authenticated copy of

said constitution, and which constitution she claims to be the paramount law of the said State.

Twenty-second. The plaintiff offered to prove, that by virtue of, and in conformity with, the provisions of said constitution so adopted as aforesaid, the people of said State, entitled to vote for general officers, senators and representatives to the general assembly of said State, under said constitution, did meet in legal town and ward meetings, on the third Wednesday in April, next preceding the first Tuesday of May, 1842, (to wit, on the 18th day of April, 1842,) and did elect duly the officers required by said constitution for the formation of the government under said constitution, and that said meetings were conducted and directed according to the provisions of said constitution and the laws of said State; and this she offered to prove by the evidence of the moderators and clerks of said meetings, and persons present at the same.

Twenty-third. The plaintiff offered in evidence, that the said general officers (to wit, the governor, lieutenant governor, secretary of State, senators, representatives, all consisting the general assembly of said State under said constitution,) did assemble in said city of Providence on the first Tuesday of May, A. D. 1842, (to wit, on the third day of May, 1842,) and did then and there organize a government of the said State, in conformity with the provisions and requirements of said constitution; and did elect, appoint, and qualify officers to carry the said constitution and laws into effect; and to prove the same, she offered exemplified copies of the acts and doings of said general assembly, (copies of which are annexed to said case, marked N^a, N^b, N^c.)

Twenty-fourth. The plaintiff offered in evidence a duly certified copy of that part of the census of the United States, for the year 1840, which applies to the district and State of Rhode Island, &c., (annexed to said case, and marked O.)

Twenty-fifth. The plaintiff offered in evidence a certificate, signed by Henry Bowen, secretary of the then existing government of the State of Rhode Island, showing the number of votes polled by the freemen in said State for the ten years then last past, (a copy of which is annexed to said case, marked P,) and also under the same certificate an act (marked Q,) purporting to establish martial law.

Twenty-sixth. And the plaintiff offered in evidence an authenticated copy of an act of the general assembly, under the charter government, passed at their June session, 1842, entitled an act to provide for calling a convention of the people, &c., and an act in amendment thereof, (a copy whereof is annexed to said case, and is marked Q^a,) and also a copy from the records of the house of representatives, (under said government,) at their March session, A. D. 1842, a copy whereof, annexed to said case, is marked R.)

Second. Saving which, if overruled by the court, the plaintiff further offered to prove, that the charter assembly of Rhode Island which passed said act of June 25, 1842, declaring martial law, had no power to pass such law derived from the said charter, nor from the people, nor in any form delegated to them; and she offered to prove this by the

charter granted by King Charles 2d to Rhode Island and Providence Plantations under which said assembly acted, giving the sole right to use and exercise the law martial, in such cases only as occasion shall necessarily require, "to such commanders, governors, and military officers as should be regularly appointed and constituted for the conducting and training up the inhabitants in military affairs, and for the defence and safeguard of the plantations.

Third. The plaintiff offered to prove that the act passed by the charter assembly at the March adjourned session, 1842, concerning offences against the State, commonly called the Algerine act, was repealed by the general assembly acting under the People's constitution, May 3d, 1842, and therefore became of no effect at the time of the acts committed by the defendants.

Fourth. The defendant offered to prove that, on the 29th of June, when the acts complained of in her declaration were committed, there was no camp or military company in the town of Warren, and no person or persons in hostile array against the charter government, nor designing or attempting any enterprise against it in said Warren or vicinity. That the only points in the State at which troops were assembled in support of the People's constitution, and against the charter government, was more than twenty-five miles distant from said Warren. That in the afternoon of the twenty-seventh of said June, it was known by Governor King, and the council of the charter government, and also by Major General McNeil, commanding their forces, and by Colonel Bankhead of the U. S. Army, Thomas M. Burgess, mayor of the city of Providence, John Whipple, esq., and Richard J. Arnold, assistant commissary general, and others, that on the morning of that day Governor Dorr had disbanded his troops at Chepatchet, and the conflict was at an end; and that the said Dorr had issued the following order, which was also sent by him to Walter S. Burgess, esq., in said Providence, to be published in the newspaper express, the organ of said Dorr's party; and that with full belief that said Dorr's troops were disbanded, the said order having been intercepted by the said Governor King and counsel, was retained and suppressed, so that it was not published until about noon of the following day, to wit, the twenty-eighth of said June.

GLOUCESTER, R. I., *June* 27, 1843.

To the PUBLISHERS OF THE EXPRESS,
Providence, R. I.

Having received such information as induces me to believe that a majority of the friends of the People's constitution disapprove of any further forcible measures for its support, and believing that a conflict of arms would, therefore, under existing circumstances, be but a personal controversy among different portions of our citizens, I hereby direct that the military here assembled be dismissed by their respective officers.

(Signed) T. W. DORR, *Commander-in-chief.*

And the plaintiff offered to prove that the said troops were disbanded on that day, and no act of military hostility was afterwards shown to the Charter government, and that the town of Warren was ten miles distant from the city of Providence, with means of constant and ready communication between said places, and that the said Child knew the above when he gave his orders to arrest said Luther.

Fifth. The plaintiff offered to prove that the said Martin Luther had committed no act against any supposed law of the Charter government, except to preside as moderator in a town meeting in said town of Warren, on the 18th of April, 1842, to receive the votes of the people under the said People's constitution. That he had lived in said Warren nearly forty years. That he remained in said Warren until about the time of the attempt to seize him in his dwelling-house by the defendants, when the trespass alleged in the plaintiff's writ was committed. That the offence with which he was charged, to wit, acting as moderator aforesaid, was by the said act of the Charter government punishable by civil process. That there were at the time of the acts done by the defendants civil magistrates and officers in said Warren, with full powers under the said Charter government to arrest the said Luther; and that no exigency existed which required the aid of martial law instead of the civil law to make such arrest, or to seize the person of said Luther; and further, that said Luther was exempt by law from military duty.

Sixth. The plaintiff offered to show that no governor, commander, or other military officer in Rhode Island, had declared martial law.

Seventh. The plaintiff offered to show that Governor Dorr and those associated with him were officers chosen under the People's constitution, or appointed by the legislature under such constitution, and acted in good faith under said authority as in their judgment the supreme law of the State, and were not attempting to subvert laws or destroy government, but to enforce the same under the said constitution and forms of law and government.

Eighth. That the Charter assembly had applied to the President of the United States as in a case of insurrection, and he had taken the direction of the same, and sent his officers to exercise military power in Rhode Island; and this she offered to prove by the President's message, the documents, and the correspondence in Document No. 225 of the House of Representatives, at the first session of the 28th Congress, which documents and correspondence she offered to verify.

Ninth. The plaintiff offered in evidence an act of the Charter assembly, at the May session, 1842, declaring, that an insurrection existed in the State, and making a requisition on the President of the United States to interpose the authority of the United States, and the letter of the President of the United States to the Governor of the State of Rhode Island, dated May 7, 1842. The letter of Samuel W. King, Governor of Rhode Island, to the President of the United States, dated May 25, 1842. The orders of the President of the United States to the Secretary of War, dated June 29, 1842.

Tenth. The plaintiff offered in evidence the acts of the Charter as-

sembly, , 1842, calling the militia of said State into actual service; and the act of the Revised Statute of Rhode Island for 1822, page 375, concerning the militia, sec. 20; and the articles of war prescribed by Congress for the government of the troops of the United States.

Eleventh. The plaintiff offered evidence that the writ of habeas corpus was not suspended by any act of the Charter assembly of Rhode Island during the month of June, 1842, nor subsequent thereto; that the functions of the civil magistrates and the courts of law continued in full force in said State.

Points of law.

The counsel for the plaintiff requested the honorable court to instruct the jury, as follows:

First, as to the validity of the act declaring martial law.

1. That the Charter assembly of Rhode Island had not power to pass said law.

2. That under the evidence offered by the plaintiff, the People's constitution, at the time of passing of said act, was in force as the supreme law of the State, and all acts inconsistent therewith were void.

3. That if the Charter assembly was at the time the lawful legislature of Rhode Island, it had no authority under the charter to declare martial law by a legislative enactment, that power being given by said charter to certain military officers therein designated.

4. That the said act of June, 1842, declaring martial law, is defective and inoperative, and gave no power to military commanders or subordinate officers to exercise martial law, and described no limits or territorial jurisdiction.

5. That the power to declare and exercise the law martial must exist in the military organization, and depend upon the necessity and emergency requiring its exercise, and is not a matter of civil enactment; and that this power was not given to the Charter assembly, but to the military organization by the terms of the charter, by the customs and ancient usages under which said assembly derived their powers.

6. That the majority of the people of Rhode Island having adopted a constitution, in their sovereign capacity, and under the popular right to reassume the powers of government, and in the absence of any provision of existing laws on constitution to alter the frame of government, the attempt of the officers elected under such constitution to carry the same into effect did not constitute rebellion or insurrection in a State.

7. That martial law must be de facto and not a mere proclamation over territory, and is limited in its exercise to the place of military occupancy.

8. That its jurisdiction over persons and acts extends to military officers only, and to members of the army, or to those of the opposite army or hostilities, and cannot be exercised upon others, persons who are to be ordered and governed according to the civil laws, though it were a time of war.

9. That by a law of Rhode Island the militia of the State, when

called into actual service, shall be subject to the articles of war prescribed by Congress, and that the law martial in such case is to be governed by those articles, and not by legislative enactments of the State.

10. That the law martial has no place in the institutions of this country, except under the articles of war.

11. That a subordinate officer cannot exercise the law martial without the direct orders of his commanding officer within the district of military occupancy.

12. That to render martial law in a State a justification for acts done under it aside from military discipline, and in derogation of civil rights, the exigency contemplated in the Constitution of the United States for the interposition of the President to call out the militia to suppress insurrection must exist, and the President and not the legislature is the constitutional judge of this exigency.

13. That the Governor of Rhode Island having applied to the President of the United States to suppress insurrection, and having received assurance of aid whenever the cause should exist, the State of Rhode Island was not after such recognition justified in declaring martial law, and assuming to judge of the exigency, or to carry on war.

14. That any act or power in derogation of standing laws and fundamental rights is to be strictly construed in favor of the right.

15. That no citizen is bound to serve in the military force, unless liable to do duty in the militia.

Second. As to the orders to and acts of defendant.

1. That if, in the opinion of the jury, under the facts that there was no exigency or necessity for the order given to the defendants to arrest said Luther, such order will not justify the defendant.

2. That there must be a reasonable ground of suspicion, and not vague suspicion, and such an exigency as would induce a reasonable man to act, to justify the defendants under the order of Quartermaster Childs.

3. That if, in the opinion of the jury under the facts, the civil power was sufficient, and no exigency existed requiring the order for the arrest of said Luther under martial law, such order cannot be a justification.

4. That if a soldier is ordered by his commanding officer to violate the Constitution of the United States, or the constitution or law of a State, he cannot plead the order in justification of an act unlawful in itself, even if he obeys to avoid punishment by his military superior.

5. That the defendants have the burthen of proof to show that the order under which they claim to justify was lawful, and that there was, on their part, a lawful performance; and, if they fail on either point, their justification will not avail.

6. That the defendants are liable for any excess committed by them under color of executing said order, and that the acts done by them must appear to be the necessary results, and for the legitimate purpose of executing said order.

7. That the jury are to inquire whether the defendants, if justified

by the order to arrest Luther, did only what was proper and necessary for the discharge of their duties, and if they exceeded this they will be liable.

8. That the defendants, claiming to justify under martial law, are held to the strict performance of duty, without excess, as a civil officer would be in the service of a process, and are equally liable for any excess of authority.

Defendants' offerings.

Be it remembered that, upon the trial of the aforesaid issue before the jury duly empannelled to try the same, the defendants offered in evidence, in support of their first, second, and third pleas:

First. The charter of the colony of Rhode Island and Providence Plantations, and the acceptance of the same at a very great meeting and assembly of all the freemen of the then colony of Rhode Island and Providence Plantations, legally called and held at Newport, in said colony, on the twenty-fourth day of November, A. D. 1663.

That on the twenty-fifth day of November, 1663, the former lawful government of said colony dissolved itself, and the said charter became and was henceforth the fundamental law or rule of government for said colony. That under and by virtue of said charter, and the acceptance thereof as aforesaid, the government of said colony was duly organized, and by due elections was continued, and exercised all the powers of government granted by it, and was recognised by the inhabitants of said colony, and by the King of Great Britain and his successors, as the true and lawful government of said colony, until the fourth day of July, A. D. 1776.

That the general assembly of said colony from time to time elected and appointed delegates to the general congress of the delegates of the several colonies of North America in the years 1774, 1775, and 1776, and to the Congress of the United States of America in the years 1776 and 1778; and that said delegates of said colony of Rhode Island and Providence Plantations were received by and acted with the delegates from the other colonies and States of America, in Congress assembled, as the delegates representing the said colony and State of Rhode Island and Providence Plantations; and that, on the fourth day of July, A. D. 1776, said delegates of the said colony of Rhode Island and Providence Plantations united with the delegates of the other colonies as representatives of the United States of America, and, as such, assented to and signed, in behalf of said colony, the Declaration of the Independence of the United States of America.

That afterwards, to wit, at the July session of the general assembly of said State of Rhode Island and Providence Plantations, said general assembly, by resolution thereof, did approve the said Declaration of Independence made by the Congress aforesaid, and did most solemnly engage that they would support the said General Congress in the said declaration with their lives and fortunes.

That afterwards, to wit, on the 9th day of July, 1778, the said State

of Rhode Island and Providence Plantations; by her delegates duly authorized thereunto, became a party to the articles of confederation and perpetual union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia, and ratified and confirmed the same; and as one of the United States of America, under said articles of confederation and perpetual union, was received, recognised, and acted with and by the other States of the said confederation, and by the United States of America in Congress assembled, during the continuance of said confederacy.

That after the dissolution of said confederacy, to wit, on the 29th day of May, A. D. 1790, said State of Rhode Island and Providence Plantations, in convention, duly called, elected, and assembled, under an act of the general assembly of said State, ratified the Constitution of the United States, and under the same became, and ever since has been, one of the said United States; and as such, under the Constitution and laws of the United States, and of the said State of Rhode Island and Providence Plantations, hath ever elected and sent, and doth now send, senators and representatives to the Congress of the United States, who have been since, and now are, received and recognised as such by the said United States, and in all respects have ever been received and recognised by the several States, and by the United States, as one of the said United States under the said Constitution thereof.

That from the said fourth day of July, A. D. 1776, to the present time, the said charter and the said government of the said State of Rhode Island and Providence Plantations, organized under the same, hath ever been acted under and recognised by the people of said State, and hath been recognised by each of the said United States, and hath been recognised and guarantied by the said United States as the true, lawful, and republican form of government of said State; and that the said charter continued to regulate the exercise and distribution of the powers of said government of said State; and except so far as it has been modified by the resolution and the new order of things consequent thereon, continued to be the fundamental law of said State until the adoption of the present constitution of said State, and the organization of the present government under the same.

That all the officers of the said government of said colony and State of Rhode Island and Providence Plantations, organized under said charter as aforesaid, were elected in conformity with said charter, and with the existing laws, from the first organization of the government under the said charter until the organization of the government under the present constitution of said State; and were, and continued to be, in the full exercise of all the powers of said government, and in the full possession of all the State houses, court houses, public records, prisons, jails, and all other public property, until the regular and legal dissolution of said government by the adoption of the present constitution, and the organization of the present government under the same.

Second. That the general assembly of said State, at their January session, in the year of our Lord one thousand eight hundred and forty-one, passed resolutions in the words following, to wit:

Resolved by the general assembly, (the senate concurring with the house of representatives therein,) That the freemen of the several towns in this State, and of the city of Providence, qualified to vote for general officers, be, and they are hereby, requested to choose, at their semi-annual town or ward meetings, in August next, so many delegates, and of like qualifications, as they are now respectively entitled to choose representatives to the general assembly, to attend a convention to be holden at Providence on the first Monday of November, in the year of our Lord one thousand eight hundred and forty-one, to frame a new constitution for this State, either in whole or in part, with full powers for this purpose; and if only a part, that said convention have under their especial consideration the expediency of equalizing the representation of the towns in the house of representatives.

Resolved, That a majority of the whole number of delegates which all the towns are entitled to choose shall constitute a quorum, who may elect a president and secretary, judge of the qualifications of the members, and establish such rules and proceedings as they may think necessary; and any town or city which may omit to elect its delegates at the said meeting in August, may elect them at any time previous to the meeting of said convention.

Resolved, That the constitution or amendments agreed upon by said convention shall be submitted to the freemen in open town or ward meetings, to be holden at such times as may be named by said convention. That said constitution or amendments shall be certified by the president and secretary, and returned to the secretary of State, who shall forthwith distribute, to the several town and city clerks, in due proportion, one thousand printed copies thereof, and also fifteen thousand ballots, on one side of which shall be printed (amendment or constitution,) adopted by the convention holden at Providence on the first Monday of November last, and on the other side the word approveon the one-half of said ballots, and the word reject on the other half.

Resolved, That, at the town or ward meetings to be holden as aforesaid, every freeman voting shall have his name written on the back of his ballot; and the ballots shall be sealed up, in open town or ward meetings, by the clerks, and with [the] rest of the names of voters shall be returned to the general assembly at its next succeeding session; and the said general assembly shall cause said ballots to be examined and counted; and said amendments or constitution, being approved of by a majority of the freemen voting, shall go into operation and effect at such time as may be appointed by said convention.

Resolved, That a sum not exceeding three hundred dollars be appropriated for defraying the expenses of said convention, to be paid according to the order of said convention, certified by its President.

That at their May session, in the year of our Lord one thousand

eight hundred and forty-one, the said general assembly passed resolutions in the words following, to wit:

Resolved by this general assembly, (the senate concurring with the house of representatives therein,) That the delegates from the several towns to the State convention, to be holden in November next, for the purpose of framing a State constitution, be elected on the basis of population in the following manner, to wit: Every town of not more than eight hundred and fifty inhabitants may elect one delegate; of more than eight hundred and fifty, and not more than three thousand inhabitants, two delegates; of more than three thousand, and not more than six thousand inhabitants, three delegates; of more than six thousand, and not more than ten thousand inhabitants, four delegates; of more than ten thousand, and not more than fifteen thousand inhabitants, five delegates; of more than fifteen thousand inhabitants, six delegates.

Resolved, That the delegates to said convention be entitled to receive from the general treasury the same pay as members of the general assembly.

Resolved, That so much of the resolutions, to which these are in amendment, as is inconsistent herewith, are hereby repealed.

And that at their January session, in the year of our Lord one thousand eight hundred and forty-two, the said general assembly passed resolutions in the words following, to wit:

Whereas a portion of the people of this State, without the forms of law, have undertaken to form and establish a constitution of government for the people of this State, and have declared such constitution to be the supreme law, and have communicated such constitution to the general assembly; and whereas many of the good people of this State are in danger of being misled by these informal proceedings, therefor

It is hereby resolved by this general assembly, That all acts done by the persons aforesaid, for the purpose of imposing upon this State a constitution, are an assumption of the powers of government, in violation of the rights of the existing government, and of the rights of the people at large.

Resolved, That the convention called and organized in pursuance of an act of this general assembly, for the purpose of forming a constitution, to be submitted to the people of this State, is the only body which we can recognise as authorized to form such a constitution, and to this constitution the whole people have a right to look, and we are assured they will not look in vain, for such a form of government as will promote their peace, security, and happiness.

Resolved, That this general assembly will maintain its own proper authority, and protect and defend the legal and constitutional rights of the people.

And at their January session, in the year of our Lord one thousand eight hundred and forty-two, the said general assembly passed an act in the words following, to wit:

Whereas the good people of this State, having elected delegates to a

convention to form a constitution, which constitution, if ratified by the people, will become the supreme law of the State; therefore

Be it enacted by the general assembly as follows: All persons now qualified to vote, and those who may be qualified to vote under the existing laws previous to the time of such, their voting, and all persons who shall be qualified to vote under the provisions of such constitution, shall be qualified to vote upon the question of the adoption of said constitution.

That, under and by virtue of the resolutions and acts last aforesaid, a written constitution of government for the said State of Rhode Island and Providence Plantations was framed by a convention legally called, elected, and assembled, and that said proposed constitution was, in pursuance of said resolutions and acts, on the twenty-first, twenty-second, and twenty-third days of March, A. D. 1842, submitted for adoption or rejection to all persons qualified by the existing laws of said State to vote; and also to all persons who, under the provisions of said constitution, were qualified to vote in the legal town and ward meetings of said State, and of the city of Providence, legally called and assembled; and was, by a majority of the persons so qualified by law to vote thereon, and actually voting thereon, rejected. A copy of which is hereunto annexed, marked A.

Third. The defendants further offer all the acts, resolutions, and proceedings of the said general assembly of said colony and State of Rhode Island and Providence Plantations, from the organization of government under the charter, until the organization of the present government under the present constitution.

Fourth. The defendants offered evidence that, on the twenty-fourth day of June, A. D. 1842, and for a long time before, and from that time continually, until after the time when said trespasses are alleged in the plaintiff's declaration to have been committed, large numbers of men, among whom was one Martin Luther, owner and occupant of the dwelling house mentioned in the plaintiff's declaration, in which the said trespasses are alleged to have been committed, were assembled in arms in different parts of the said State of Rhode Island and Providence Plantations, for the purpose and with the intent of overthrowing the government of said State, and destroying the same by military force; and with such illegal, malicious, and traitorous intent and purpose, at and during said times aforesaid, did, in different parts of said State, make and levy war upon said State, and upon the citizens thereof, and did attempt and enterprise the hurt, detriment, and annoyance, and destruction of the inhabitants of said State, and the overthrow of the government thereof.

Fifth. That, in order to protect and preserve said State, and the government and citizens thereof, from the destruction threatened by said rebellion and military force, the general assembly of said State, on the twenty-fifth day of June, A. D. 1842, enacted and declared martial law in the words following, viz:

An act establishing martial law in this State.

Be it enacted by the general assembly, as follows:

Section 1. The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared in full force until otherwise ordered by the general assembly, or suspended by proclamation of his excellency the Governor of the State.

And thereupon, on the twenty-sixth day of June, A. D. 1842, Samuel Ward King, governor, captain general, and commander-in-chief in and over the said State of Rhode Island and Providence Plantations, issued his proclamation in the words and figures following:

By his excellency, Samuel Ward King, governor, captain general, and commander-in-chief of the State of Rhode Island and Providence Plantations.

A proclamation.

Whereas the general assembly of the said State of Rhode Island and Providence Plantations did, on the twenty-fifth day of June, A. D. 1842, pass the following act, to wit:

Be it enacted by the general assembly, as follows:

Section 1. The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force until otherwise ordered by the general assembly, or suspended by proclamation of his excellency the Governor of the State.

I do therefore issue this my proclamation, to make known the same unto the good people of this State, and all others, that they may govern themselves accordingly. And I do warn all persons against any intercourse or connection with the *traitor* Thomas Wilson Dorr, or his deluded adherents, now assembled in arms against the laws and authorities of this State, and admonish and command the said Thomas Wilson Dorr, and his adherents, immediately to throw down their arms and disperse, that peace and order may be restored to our suffering community, and as they will answer the contrary at their peril.

Further, I exhort the good people of this State to aid and support, by example and by arms, the civil and military authorities thereof, in pursuing and bringing to condign punishment all engaged in said unholy and criminal enterprise against the peace and dignity of the State.

In testimony whereof I have caused the seal of said State to be affixed to these presents, and having signed the same with my hand.

Given at the city of Providence, on the twenty-sixth day of June, A. D. 1842, and of the independence of the United States of America the sixty-sixth.

SAMUEL WARD KING.

By his excellency's command:

HENRY BOWEN, *Secretary*.

Sixth. That, at the time when the trespasses mentioned and set forth in the plaintiff's said declaration are alleged to have been committed, and at divers other times before that time, one Martin Luther, (who was the owner of the dwelling house in which the said trespasses are al-

leged to have been committed, and was an occupant of said house,) was aiding and abetting the aforesaid traitorous, malicious, and unlawful purposes and designs of overthrowing the government of said State by rebellion and military force, and in making war upon said State, and upon the government and citizens thereof.

Seventh. That at the time when the said pretended trespasses are alleged to have been committed, the said State was under martial law as aforesaid, and the said defendants were enrolled in the company of infantry in the said town of Warren, in the fourth regiment of the militia of said State, and were under the command of John T. Child.

Eighth. That said John T. Child, on the twenty-fifth day of June, A. D. 1842, was duly commissioned and sworn as a quartermaster of the fourth regiment of the first brigade of militia of Rhode Island, and continued to exercise such command until after the time when the trespasses mentioned in the plaintiff's declaration are alleged to have been committed; that, on the twenty-seventh day of June, A. D. 1842, the the said John T. Child received written orders from Thomas G. Turner, esq., lieutenant colonel commanding such regiment, and duly commissioned and sworn, "to continue to keep a strong armed guard, night and day, in the said Warren, and to arrest and take every person, either citizens of Warren or otherwise, whose movements were in the least degree suspicious, or who expressed the least willingness to assist the insurgents who were in arms against the law and authorities of the State."

Ninth. That these defendants were ordered by the said John T. Child, their commander as aforesaid, to arrest and take the aforesaid Martin Luther; and if necessary for the purpose of arresting and taking the said Martin Luther, to break and enter and search the various rooms and apartments of the dwelling house of said Martin Luther.

Tenth. That these defendants, in compliance with said orders by the said John T. Child, their commander as aforesaid, to arrest and take the said Martin Luther, and, if necessary for the purpose of arresting and taking the said Luther, to break and enter the said dwelling house, proceeded to the said dwelling house and knocked at the door, and not being able to obtain admission therein, forced the latch of the door of said house, and entered and opened and searched the different rooms and apartments of said house, for the purpose of making said arrest, doing as little damage as possible.

Eleventh. That at the time when the defendants were ordered to arrest the said Martin Luther as before stated, the town of Warren was in danger of an attack from the said Martin Luther and his confederates, and the inhabitants of said town were in great alarm on account thereof.

Whereupon the counsel for the defendants requested the court to charge the jury—

1st. That the said charter, and the government organized under the same was, at the time when the said pretended trespasses are alleged to have been committed, in law and in fact the only government of said State of Rhode Island and Providence Plantations.

2d. That under said government it was the proper duty, and within

the legal power of the legislature of said State, to protect and defend the said government and the people of said State against all attempts to overthrow said government, or to hurt or destroy the said people by rebellion or military force.

3d. That the said legislature were the proper judges of the exigency requiring a resort to measures for the putting down and defending the State against rebellion and military attack.

4th. That the act of said legislature placing the said State under martial law, passed at their June session, A. D. 1842, was legally enacted by said legislature, and was in force throughout said State at the time when the said pretended trespasses are alleged to have been committed.

5th. That under the provisions of said law the same was in force over the whole State, and all the people thereof.

6th. That under the provisions of said law the defendants in this case were bound to obey the order of the said John T. Child, their superior officer; and that the acts by them performed in obedience to said order, according to the proof made, were no trespass, but were lawful and right.

And in relation to the foregoing offerings, the foregoing agreement was filed.

Agreement.

It is agreed that all the acts, resolutions, and proceedings of the general assembly of the colony and State of Rhode Island and Providence Plantations, from the organization of the government under the charter of 1663, to the organization of the government under the present constitution, and under the same up to the date of this agreement, to be found in the records, schedules, and digests of said colony and State, may be used in the trial and argument of said case—Rachel Luther, plaintiff, vs. Luther M. Borden et als., defendants—before the Supreme Court of the United States, in the same manner as if said acts, resolutions, and proceedings had been put into these offerings and points.

It is also agreed that the papers, documents, and matters named and referred to in the bill of exceptions by the plaintiff, filed in the case—Martin Luther vs. Luther M. Borden, et als.—now pending in the Supreme Court of the United States at Washington, or there to said bill of exceptions appended, or in the offerings therein referred to, are to be taken and used as parts of this case.

It is also agreed that the printed constitution, printed by the authority of the convention, and rejected by a majority of the votes thereon on the 21st, 22d, and 23d days of March, 1842, may be used in the trial of the above case, in the same manner as if the same were put into the offerings and points in this case made and stated.

It is also agreed that all other exhibits referred to in the statements of evidence of either party, as annexed to such statement or said bill of exceptions before mentioned, may be used in the trial of said case in the same manner as if said exhibits were annexed to the statement

of the evidences in this case filed; such exhibits to be furnished to the opposite party within ten days from this date.

HORACE A. MANCHESTER,
Counsel for plaintiff.
ALFRED BOSWORTH,
Counsel for defendants.

PROVIDENCE, *August* 30, 1845.

Whereupon the court divided as follows:

Division of opinion.

And thereupon, upon the several instructions so as aforesaid asked of the court by the defendants to be given to the jury, the judges of the said court being opposed in opinion whether any of them ought to be given to the jury, and also as to the several instructions so as aforesaid asked of the court by the said plaintiff to be given to the jury, the judges of the said court being also opposed in opinion whether any of them ought to be given to the jury, the said points upon which the said disagreement did happen as aforesaid, are hereby, at the request of the plaintiff, and also at the request of the defendants, stated under the direction of the said judges, and ordered to be certified under the seal of this court to the Supreme Court of the United States at the next session thereof, to be held on the first Monday of December next, so that the said Supreme Court may finally decide whether any, and, if any, which of said instructions so as above stated asked of the said judges of this court to be given to the jury, by the defendant or by the plaintiff, ought to have been given to the jury by this court.

Witness our hands at the June term of the said circuit court aforesaid.

JOSEPH STORY,
One of the justices of the Supreme Court of the United States.
JOHN PITMAN,
District judge of Rhode Island district.

RHODE ISLAND DISTRICT:

CLERK'S OFFICE, CIRCUIT COURT,
At Providence, December 8, *A. D.* 1845.

I, John T. Pitman, clerk of the circuit court of the United States, in and for the Rhode Island district, do hereby certify, that the foregoing thirty-three pages contain a true copy and transcript of the record in the case of Rachel Luther, plaintiff, against Luther M. Borden et al., defendants, now pending in said court; also a true copy of the division of opinion under which the said case is ordered to be certified to the Supreme Court, to be holden at Washington on the first Monday of December, anno domini one thousand eight hundred and forty-five. Duly examined and compared.

In testimony whereof I have hereunto affixed the seal of said circuit court, and my hand, on the day and year first above written. [L. S.]

JOHN T. PITMAN,
Clerk circuit court for Rhode Island district.

Filed 23d January, 1846.